Supreme Court, U. S.
FILED
OCT 2 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-260

L. N. McDONALD and RAYMOND L. LAIRD,
Petitioners
v.
SANTA FE TRANSPORTATION COMPANY and TEAMSTERS FREIGHT, TANK LINE AND AUTOMOBILE INDUSTRY EMPLOYEES, LOCAL UNION NO. 988,
Respondents

BRIEF OF SANTA FE TRAIL TRANSPORTATION COMPANY IN OPPOSITION TO PETITION FOR A WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

McLeod, Alexander, Powel & Apffel, Inc.

Benjamin R. Powel
808 Sealy & Smith Professional Building
200 University Boulevard
P. O. Box 629
Galveston, Texas 77550
Tele. No. AC-713, 763-2481

Attorneys for Respondent, Santa Fe Trail Transportation Company

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

INDEX

	Page
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
CONCLUSION	8
CERTIFICATE OF SERVICE	10
APPENDIX A (Docket Sheet)	11

LIST OF AUTHORITIES

CASES

	Page
Action v. Gannon, 450 F.2d 1227 (1971)	8
DeMatteis v. Eastman Kodak Co., 511 F.2d 306 (2d Cir. 1975)	8
McDonald v. Santa Fe Trail Transportation Co., 513 F.2d 90 (1975)	2
McDonnell Douglas Corp. v. Green, 411 U.S. 792, 3rd L.Ed. 2d 668 (1973)	5, 6, 7
Perkins v. Banster, 190 F.Supp. 98, affirmed 285 F.2d 426	8
Sullivan v. Little Hunting Park, Inc., 396 U.S. 235 (1969)	7, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-260

L. N. McDONALD and RAYMOND L. LAIRD,
Petitioners

v.

SANTA FE TRANSPORTATION COMPANY and TEAMSTERS FREIGHT, TANK LINE AND AUTOMOBILE INDUSTRY EMPLOYEES, LOCAL UNION NO. 988,
Respondents

BRIEF OF SANTA FE TRAIL TRANSPORTATION COMPANY IN OPPOSITION TO PETITION FOR A WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

This Brief in opposition to the granting of a Writ of Certiorari is filed on behalf of the Santa Fe Trail Transportation Company (erroneously referred to in the Petition for a Writ of Certiorari as "Santa Fe Transportation Company").

STATEMENT OF THE CASE

This Respondent supplements and corrects Petitioners' Statement of the Case as follows:

As evidenced by the Docket Sheet (App. _____), this action was dismissed after more than two and a half years of pretrial activity, including Motions to Dismiss, the taking and filing of Interrogatories and depositions, and pretrial.

The Trial Court found that the pleading of the plaintiffs did not allege that they were falsely charged with misappropriating company property and that the substance of plaintiffs' allegations is that the plaintiffs take issue with the fact that they were discharged for misappropriating company property while a similarly charged negro employee was not discharged (App to Petition, pg. 28).

In Petitioners' Statement of the Case, they attempt to urge denial of McDonald to the charge of misappropriating company property by pointing to an exhibit attached to the Original Answer of Defendant, National Brotherhood of Teamsters Local No. 988 (App to Petition, pg. 49). This assertion was, however, not made by plaintiffs in their own pleadings before the Court, nor was any denial of misappropriating company property asserted to either the Trial Court or to the Court of Appeals in Petitioners' Brief.

Both the Trial Court and the Court of Appeals found as fact that "there is no allegation that plaintiffs were falsely charged". *McDonald v. Santa Fe Trail Transportation Co.*, 513 F.2d 90 (1975).

In considering the pleadings, the Motions, the Brief, discovery, argument of counsel and the record as a whole,

the Trial Court properly concluded that the allegation of dismissal of white employees who had misappropriated company property without a dismissal of a negro employee similarly charged does not plead a claim of racial discrimination under Title VII (App, to Petition, pg. 28). This finding was adopted by the Court of Appeals for the Fifth Circuit. McDonald v. Santa Fe Trail Transportation Co., supra.

Petitioners' statement that they were never afforded an opportunity by the District Court to offer evidence is just not true, in that the Court had before it the pleadings, Motions, Briefs, arguments of counsel (who is not Petitioners' counsel on appeal) and the record as a whole, to make its factual determination.

Petitioners make no complaint of the District Court's conclusion that the action could not be maintained as a class action, since the number of white persons who may be terminated upon charges of misappropriating company property does not satisfy the numerousity requirements of Rule 23 (App. to Petition, pg. 25). No such complaint was made to the Court of Appeals for the Fifth Circuit.

REASONS FOR DENYING THE WRIT

1. A WRIT SHOULD NOT ISSUE MERELY TO ACCORD PETITIONERS ANOTHER HEARING ON THEIR COMPLAINT OF THE PROCEDURAL HANDLING AND FACTUAL FINDINGS OF THE TRIAL COURT.

Petitioners complain of the findings of fact of the Trial Court and urge that they were not afforded an opportunity to offer evidence. As pointed out in the Statement of the Case, Petitioners' case was before the Trial Court for

more than two and a half years, with abundant pleadings, Motions, Briefs, discovery, argument of counsel and the record as a whole, which the Trial Court had for consideration.

The Trial Court, under authority of FRCP Rule 12(b), was authorized to consider only the pleadings or, in the alternative, to consider matters outside of the pleadings, treating the Motion as one for Summary Judgment under FRCP 56, in arriving at its determination that the white plaintiffs had failed to present a claim under Title VII, wherein their dishonesty was not denied, and their basis of racial discrimination was in the comparative severity of disciplinary action.

Petitioners had ample and reasonable opportunities to present all materials pertaining to the various Motions to Dismiss considered by the Trial Court, which were numerous. In January, 1974, the Trial Court denied the Motions to Dismiss, without prejudice to their being reurged (Petitioners' App, pg. 34). The employers submitted additional Motions to Dismiss on April 22, 1974, and Petitioners file absolutely no oppositions thereto prior to the Court's hearing and considering the Motions (App, pg. _____). The matter was re-opened on May 22, 1974, in response to a Motion to Correct and Clarify the Memorandum and Order filed by the Union (App, pg. _____), and Final Judgment was not entered by the Trial Court until June 13, 1974 (App, pg. ____).

2. THERE IS NO CONFLICT WITH THE DECISIONS OF THIS COURT.

(a) *Title VII.* The holding of the Court of Civil Appeals for the Fifth Circuit is not contrary to any of the decisions of this Honorable Court. The thrust of

Petitioners' argument is directed toward the Court's decision in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 3rd L.Ed.2d 668 (1973).

This Honorable Court's holding in the *Green* case, supra, is substantially distinguishable not only on the facts but on the application of the law to those facts. The Trial Court, in *Green,* supra, erroneously focused its attention on the retaliatory provision of Title VII (2000e-3(a)) and refused to consider, and in fact allowed no evidence on, plaintiff's claim under 2000e-2(a)(1). *Green* involved a case where an employer allegedly discriminated in refusing to rehire a former employee, admittedly qualified for an available job, by reason of his previous activities while not an employee, which consisted of obstructing roadways to the employer's plant and participating in chaining shut doors of a building in which employees of McDonnell Douglas Corp. were employed. The activity of obstructing traffic was apparently a misdemeanor, to which Green pled guilty.

In the instant case, McDonald, a driver, and Laird, a night supervisor, were charged with theft of property from the employer, while in the company's employ, which action, after a general investigation, resulted in their dismissal by the company.

Theft of company property over a value of $200.00 is a felony under the Texas Penal Code, Article 31.03, Vernon's Texas Codes Annotated - Penal.

The dismissal of these two (2) white employees on its face was a result of and immediately following the theft of company property and, on its face, was directly related to the ability of these two (2) employees to perform their jobs. These employees are respectively a truck driver

for a truck transportation company entrusted with the goods and commodities of others for transportation and a dock foreman or superintendent having supervisory duties obviously including the safe transportation, accounting for and handling of goods and commodities of his employer's customers.

Green's situation was entirely dissimilar. Green was a black man, a member of an obvious minority group, was obviously qualified for the job for which he applied and, under the facts of the *Green* case, supra, it was obvious that the employer may have seized upon Green's previous civil rights activities as a pretext for refusing to hire him, though he was qualified.

This Honorable Court, in the *Green* case, supra, noted that the employee, to establish a prima facie case, must show (1) that he belongs to a minority race; (2) that he is qualified for the job in question; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the job remained open or that the employer continued to seek applications from persons of complainant's qualifications. While this Honorable Court, in its Opinion, pointed out that these facts may not necessarily apply to each Title VII case, the Court's statements of the elements of a prima facie case are at least instructive.

These criterion applied to the case at hand show, first, that petitioners are not members of a minority race; and, secondly, how can petitioners argue that they are qualified to continue to be entrusted with the goods and commodities handled by the employer transportation company, when the facts of theft are apparent and not denied by the petitioners. Accordingly, the allegations of disparity in disciplinary action by the employer, involving a claim of equal complicity by three (3) employees in an episode

of theft from the employer's property, isolated to complain of disparity in discipline between two (2) white employees in comparison to a negro employee involved in the affair, not only fails to state a cause of action, but certainly cannot be construed to be contrary to the holding of this Honorable Court in *McDonnell Douglas Corp. v. Green*, supra.

(b) *Section 1981*. The decision of the Court of Appeals is not contrary to any decisions of this Honorable Court on the question of whether or not a white employee has a cause of action for alleged racial discrimination in employment under 42 USC, Section 1981, and is consistent with this Court's decision on 42 USC, Section 1982, *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 235 (1969).

In *Sullivan*, the Court held that a white person, alleging punishment for vindicating the rights of minorities, has standing to sue under Section 1982. In the instant case, no claim is made that petitioners were dismissed for vindicating the rights of others.

3. THERE IS NO CONFLICT IN THE DECISIONS AMONG THE CIRCUITS.

(a) *Title VII*. Petitioners have presented no cases indicating any conflict in Courts of Appeals' decisions with the decision of the Court of Appeals for the Fifth Circuit below in the instant case.

(b) *Section 1981*. There are Circuit Courts' Opinions involving claims of white litigants, alleging discrimination by reason of the white litigants' activities in attempting to vindicate the rights of "non-Caucasians", which have followed this Honorable Court's recognition of standing of

such white litigants under 42 USC Section 1982, in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 235 (1969). See *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306 (2d Cir. 1975). However, in the instant case, no claim is made that plaintiffs were dismissed for attempting to vindicate the rights of others.

Where white persons have sued under Section 1981 solely on the grounds of racial discrimination in such white persons' own employment, Section 1981 was considered by the 4th Circuit Court of Appeals, in *Perkins v. Banster*, 190 F.Supp. 98, affirmed 285 F.2d 426, to be unavailable to white litigants in such situation as the basis for relief.

The 8th Circuit, in *Action v. Gannon*, 450 F.2d 1227 (1971), in a conspiracy to discriminate case under 42 USC Section 1895(3), specifically declined to affirm the lower Court's finding of jurisdiction under 42 USC Section 1981, 303 F.Supp. 1240 (E.D. Mo. 1969).

Accordingly, while the question of standing of white litigants to sue for redress, where alleging discrimination in their own employment, is still being developed in a myriad of conflicting fact situations in the District Courts, no differences in the Circuit Courts' Opinions are presented.

CONCLUSION

Respondent submits that this case presents a poor vehicle for consideration of the scope of statutory regulation of employment conditions. It involves the theft by the complaining, disgruntled white employees of property in the care of employees charged with the responsibility for its care and protection. The white employees, disgruntled by

the stern application of discipline by the employer, have seized upon this isolated incident to complain because an involved black employee was less severely disciplined.

Civil rights activities by the petitioners is in no way involved. The discharge of culpable employees in connection with the theft of property in the care and custody of the employer transportation company is a directly responsive job-related action. No hint of discriminatory practices or politics against whites is presented.

Petitioners have shown no conflict between the decision in this case and this Honorable Court's decisions on the standing of whites seeking remedies private to them.

Petitioners also seek the granting of a Writ for the purpose of having the Court extend the application of Section 1981 relief to white persons who are members of the overwhelming majority in this country, and provide yet another judicial vehicle for actions by whites to pursue private employment rights against employers.

This area of law is still developing in the District Courts below. While the time may come when the Circuits are in such disagreement that this Honorable Court should point the direction, such time has not come, especially in view of the factual posture of white employees charged with the crime of theft, which strikes at the employer transportation company's very reason for being—the safe movement of goods for its customers.

Giving white employees the right to challenge the comparative severity of discipline assessed because of felonious crimes directed at the employer, completely unrelated to civil rights activities under Section 1981, would not serve to assure equal employment opportunities, but to make

every discipline assessed white employees subject to litigation and review by the federal judiciary.

For these reasons, the Writ of Certiorari should be denied.

Respectfully submitted,

McLEOD, ALEXANDER, POWEL & APFFEL, INC.

BENJAMIN R. POWEL
808 Sealy & Smith Professional Building
200 University Boulevard
P. O. Box 629
Galveston, Texas 77550
Tele. No. AC-713, 763-2481

Attorneys for Respondent, Santa Fe Trail Transportation Company

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of September, 1975, three (3) copies of the foregoing Brief of Santa Fe Trail Transportation Company in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed, postage prepaid, to Messrs. Stuart M. Nelkin, Henry M. Rosenblum and Robert B. O'Keefe, 4635 Southwest Freeway, Suite 320 West, Houston, Teas 77027, and to Messrs. James P. Wolf and Chris Dixie, Suite 401, 609 Fannin Street, Houston, Texas 77002, who are all parties required to be served.

BENJAMIN R. POWEL

APPENDIX A

CLOSED 5-2-74
JS 6 made pt

71-H-891

CIVIL DOCKET
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
C. Form No. 106A Rev. Houston Division

Jury demand date:

CARL O. BUE, JR

TITLE OF CASE	ATTORNEYS
L. N. McDONALD & RAYMOND LAIRD VS THE SANTA FE TRAIL TRANSPORTATION CO. AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 988	For plaintiff: ~~ISAAC E. HENDERSON~~ ~~711 Main Building~~ ~~Houston, Texas 77002 pd pdu~~ ~~2619 Blodgett 521-9555~~ James Bullock 4719 Dowling Houston, Texas 77004 529-4701 For defendant: Sante Fe Trail Trans.- McLeod, Alexander, Powel & Apffel (Robert W. Alexander) P.O.Box 629 Galveston, Texas 77550 International Union No. 988- James P. Wolf DIXIE, WOLF & HALL 609 Fannin St. Bldg., #401 Houston, Texas 77002 223-4444

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
. 5 mailed	Clerk		5/16/74	I E H	15 00	
			5/20/74	Q3 1-5		15 00
. 6 mailed	Marshal		5/24/74	J. Bullock Not. of Appeal	$5.00	
is of Action: Civil Rights, Junctive Relief, Preliminary Permanent Injunction	Docket fee		6-3-74	C.D. 1-35		5 00
	Witness fees					
tion arose at:	Depositions					

71-H-891

CARD 0. 1

DATE	PROCEEDINGS	Date Or Judgmer
9/16/71	Original Complaint filed in Duplicate	1.
9/16/71	Summons issued on Santa Fe Transportation Company	
9/15/71	Summons on Santa Fe Ret. & filed. Ex. 9/9/71	2.
9-30-71	Defendant the Santa Fe Trail Transportation Company's motion to dismiss filed in duplicate (M /D 10-11-71)	3 11
9-30-71	Defendant the Santa Fe Trail Transportation Company's brief in support of its motion to dismiss filed in duplicate	4 12
10/14/71	Plaintiff's Reply to Defendant's Motion to Dismiss, filed.	5. 13
11/15/71	Summons issued on International Brotherhood of Teamsters Local, No. 988	
12/6/71	Summons returned, executed on 11-17-71 on International Brotherhood of Teamsters Local No. 988, filed.	6.
12-7-71	ANSWER of Local Union No. 988, filed.	7 7
3/7/72	Plaintiff's Motion for Leave to File Amended Complaint, filed.	8. 7
3/7/72	Plaintiffs' First Amended Complaint filed in Duplicate.	9.3
4/11/72	Answers of the Santa Fe Trail Transportation Co. to Plaintiffs' Interrogatories, filed.	10.3
4/24/72	Plaintiff's Interrogatories to Deft. Santa Fe Trail Transportation Co., filed.	11.4
9-10-73	Motion (Isaac E. Henderson) to withdraw filed	12 4
9-11-73	(COB) PRE-TRIAL held.	
9-11-73	(COB) "The motion of Issac E. Henderson to withdraw as one of the counsel of record representing plaintiffs is GRANTED. . ."	41-A
7/19/73	Plaintiff's Second AMENDED COMPLAINT, filed.	13.4
7/25/73	Deft. Teamsters Local Union No. 988's Combined Notice of and MOTION to Dismiss, M/D 8/13/73.	14.5
7/25/73	Deft. Teamsters Local Union No. 988's BRIEF in Support of its Motion to Dismiss, filed.	15.6
7/25/73	Deft. Local Union No.988's FIRST AMENDED ANSWER, filed.	16.4
1-28-73	ORIGINAL ANSWER of Deft. The Santa Fe Trail Transportation Co., filed.	17 7
1-28-73	Deft. The Santa Fe Trail Transportation Co.'s MOTION TO DISMISS, filed. M/D: 12-24-73 by Clerk	18 7
1-28-73	Deft. The Santa Fe Trail Transportation Co.'s BRIEF in Support of Its Motion to Dismiss, filed.	19 8
2- 3-73	Amended Certificate of Service to Deft.'s The Santa Fe Trail Transportation Co.'s Motion to Dismiss, Brief in Support of Its Motion to Dismiss and Original Answer, filed.	20 8
2- 7-73	(COB) MEMORANDUM & ORDER, signed & filed. Pltf. directed to submit opposition to deft. Teamsters' Motion to Dismiss as well as Deft. Santa Fe's Motion to Dismiss no later than 12-24-73, or case will be dismissed for want of prosecution. (parties ntfd by c/c,rlo)	21 8
2-12-73	Deft. Santa Fe Trail Transportation Co.'s Supplemental BRIEF in Support of Its Motion to Dismiss, filed.	22 9
2-26-73	Pltf.'s Motion and MEMORANDUM in Opposition to Deft.'s Santa Fe Trail Transportation Co.'s Motion to Dismiss and Brief in Support, filed.	23 10

CA 71-H-891 Carl O. Bue, Jr.

Page #2

D. C. 110A Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Judge
1- 4-74	(COB) MEMORANDUM AND ORDER, signed & filed, Defts. Teamsters Local Union No. 988 and Santa Fe Trail Transportation Co.'s MOTIONS to Dismiss DENIED. Parties ntfd. by c/c. pt	10 24
1- 4-74	Deft. Santa Fe Trail Trans. MOTION FOR CONTINUANCE, filed.	25
1- 7-74	(COB) ORDER granting Motion of Santa Fe Trail Trsp. Co. for Continuance and re-setting case for trial at 10:00 am. May 3, 1974, signed & filed. (parties notified by c/c,rlo	26 111
4-22-74	Deft. Santa Fe Trail Transportation Co.'s SECOND MOTION TO DISMISS, filed. M/D: 4-29-74	27
4-22-74	Deft. Santa Fe Trail Transportation Co.'s SECOND SUPPLEMENTAL BRIEF in Support of Its Motion to Dismiss, filed.	28 114
5- 2-74	(COB) MEMORANDUM AND OPINION, signed & filed, Deft. Santa Fe Trail Transportation Co.'s Motion to Dismiss for lack of jurisdiction GRANTED; Court concludes action may not be maintained as a class action; action dismissed as to Deft. International Brotherhood of Teamsters Local No. 988 for want of jurisdiction; Court dismissed action w/prej. Parties ntfd. pt	29 117
5- 2-74	(COB) FINAL JUDGMENT, signed & filed, cause dismissed w/prej. Parties ntfd. by copy. pt	30 12
5- 9-74	DEPOSITIONS of the following, filed:	124
	Charles Adrian Jackson	31
	L. N. McDonald	32
	Donald Howard Stratton	33
	Fred Osburn, Jr.	34
	Raymond Laird	35
5-22-74	Deft. Motion to Correct and Clarify Memorandum and Opinion accompanying Final Judgment herein of 5-2-74, filed.	36 12
5-24-74	Plffs' Notice of Appeal, filed.	37
6-13-74	(COB) MODIFIED MEMORANDUM & OPINION, filed. No proper basis for Title VII relief found and action against Deft. IBT # 988 dismissed for want of jurisdiction; further consideration as to deft. Santa Fe Trail Trsp. Co.-no claim upon which Title VII relief can be granted. This case dismissed with prejudice. Parties notified by copy.	38 131
6-13-74	(COB) FINAL JUDGMENT, filed. Case dismissed w/prejudice in line with its Memorandum & Opinion of even date. Parties notified by copy. rlo	39 134